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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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GARY WOLFINGBARGER,

Appellant,

v.

Appeal No. 052962

PRICIE FERN WOLFINGBARGER,

Circuit Ct. Civil Action No. 99-D-700

Appellee.

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PETITION FOR AN APPEAL FILED ON BEHALF OF THE APPELLANT FROM A FINAL ORDER ISSUED BY KANAWHA COUNTY FAMILY COURT JUDGE ROBERT MONTGOMERY (UPHELD BY KANAWHA COUNTY CIRCUIT COURT JUDGE IRENE BERGER)

AND

APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR APPEAL

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TABLE OF CONTENTS

	Page
TYPE OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL	5
STATEMENT OF THE FACTS OF THE CASE	5
ASSIGNMENTS OF ERROR	13
ARGUMENT	14
CONCLUSION AND RELIEF SOUGHT	30

TABLE OF AUTHORITIES

Case	Page
Smith v. State Workmen's Compensation Commissioner, 159 W. Va. 108, 219 S.E.2d 361 (1975)	14
Anderson v. Wood, 204 W. Va. 558, 514 S.E.2d 408 (1999)	14
Expedited Transportation Systems, Inc. v. Vieweg, 207 W.Va. 90, 529 S.E.2d 110 (2000)	14-15
State v. Allen, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999)	15
E.H. v. Matin, 201 W. Va. 463, 498 S.E.2d 35 (1997)	15
Nelson v. West Virginia Pub. Employees Ins. Bd., 171 W. Va. 445, 300 S.E.2d 86 (1982)	15
Keplinger v. Virginia Elec. and Power Co., 208 W.Va. 11, 537 S.E.2d 632 (2000)	15
Clint Hurt & Associates, Inc. v. Rare Earth Energy, Inc., 198 W.Va. 320, 480 S.E.2d 529 (1996)	17
Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962)	17
Dawson v. Norfolk and Western Ry. Co., 197 W.Va. 10, 475 S.E.2d 10 (1996)	17
VanKirk v. Green Const. Co., 195 W.Va. 714, 466 S.E.2d 782 (1995)	17
Watts v. W. Va. Dept. of Health and Human Res./Div. of Human Svcs, 95 W.Va. 430, 465 S.E.2d 887 (1995)	17
HN Corp. v. Cyprus Kanawha Corp., 195 W.Va. 289, 465 S.E.2d 391 (1995)	17
Raines v. White, 195 W.Va. 266, 465 S.E.2d 266 (1995)	17
Akers v. West Virginia Dept. of Tax and Revenue, 194 W.Va. 456, 460 S.E.2d 702 (1995)	17
Scyoc v. Holmes, 192 W.Va. 87, 450 S.E.2d 784 (1994)	17
Fraley v. Family Dollar Stores of Marlinton, West Virginia, Inc., 188 W.Va. 35 422 S.E.2d 512 (1992)	17
Billiter v. Melton Truck Lines, Inc., 187 W.Va. 526, 420 S.E.2d 286 (1992)	17
Sally-Mike Properties v. Yokum, 175 W.Va. 296, 332 S.E.2d 597 (1985)	17
Bossie v. Boone Co. Bd. Of Education, 211 W.Va 694, 568 S.E.2d 1 (2002)	18
Sylvania Industrial Corporation v. Lilienfeld's Estate, 132 F.2d 887, 892 (1943)	18
Waddy v. Riggleman, ____ W.Va. _____, 606 S.E.2d 222 (2004)	19
Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 468 S.E.2d 712 (1996)	19
State Farm Mut. Auto. Ins. Co. v. Pederson, 185 Va. 941, 41 S.E.2d 64 (1947)	19
Laing v. Price, 75 W.Va. 192, 83 S.E.2d 497 (1914)	20
Shreve v. Casto Trailer Sales, Inc., 150 W.Va.669, 149 S.E.2d 238 (1966)	20
Gaston v. Wolfe, 132 W.Va. 791, 53 S.E.2d 632 (1949)	20
Calacino v. McCutcheon, 177 W.Va. 684, 356 S.E.2d 23 (1987)	20
Wood v. Snodgrass, 116 W.Va. 538, 182 S.E.2d 286 (1935)	20
Bruner v. Miller, 59 W.Va. 36, 52 S.E. 995 (1906)	21

TABLE OF AUTHORITIES [CONT'D]

Case	Page
Wortington v. Collins, 39 W.Va. 406, 19 S.E. 527 (1894)	21
Ellison, Son & Co. v. Flat Top Grocery Co., 69 W.Va. 380, 71 S.E. 311 (1911)	21
Prudential Insurance Company of America v. Couch, 180 W.Va. 210 376 S.E.2d 104 (1988)	22
Wolfe v. Sutphin, 201 W.Va. 35, 491 S.E.2d 35 (1997)	22
Shank v. Shank, 182 W. Va. 271, 387 S.E.2d 325 (1989)	23
Mayhew v. Mayhew, 205 W.Va. 490, 519 S.E.2d 188 (1999)	23
Watson v. Watson, 113 W.Va. 267, 168 S.E. 373 (1933)	30, 32
West Virginia Code	
W.Va. Code §48-7-102	12, 13, 14, 24, 29
W.Va. Code §48-7-103	13, 20, 21, 22, 23, 29
W.Va. Code §48-6-101	13
W.Va. Code §48-1-237	20, 21
W.Va. Code §48-6-301	25, 26, 27, 28
Other	
Black's Law Dictionary 1308 (7th ed. 1999)	17
Black, Rescission and Cancellation, 2d ed., vol. 1, § 1	17
17A Am. Jur. 2d *Contracts* § 600 (1991)	18
16 Michie's Juris., Rescission, Cancellation And Reformation §7(1987)	20
16 Michie's Juris., Rescission, Cancellation And Reformation §16	21

TYPE OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER TRIBUNAL

This matter comes on before this Honorable Court pursuant to the Petition for Appeal filed on behalf of the Appellant, Gary Wolfingbarger, from a *Final Order* issued by Kanawha County Family Court Judge Robert Montgomery dated December 31, 2004 (filed on January 5, 2005), which erroneously refused to enforce the terms of a written Property Settlement Agreement which was executed by the Appellant and the Appellee in connection with their divorce proceeding. Judge Montgomery's *Final Order* was erroneously upheld by Kanawha County Circuit Court Judge Irene Berger in an *Order* dated August 15, 2005. A copy of Judge Montgomery's *Final Order* is attached hereto as "Appellant Exhibit A"and is incorporated herein by reference. A copy of Judge Berger's August 15, 2005 *Order* is attached hereto as "Appellant Exhibit B"and is incorporated herein by reference.

The Appellant, Gary Wolfingbarger, respectfully requests that this Honorable Court accept his Petition for Appeal, to hear him upon the same, and, ultimately, to reverse the *Final Order* issued by Judge Montgomery, thereby enforcing the terms of the aforesaid written Property Settlement Agreement which was executed by the Appellant and the Appellee in their divorce proceeding .

STATEMENT OF THE FACTS OF THE CASE

The Appellant, Gary Wolfingbarger and the Appellee, Pricie Fern Wolfingbarger, were duly and legally married in Clairmont County, Ohio on or about September 23, 1978. On or about March 12, 1979, the Appellant utilized approximately $88,000.00 from the proceeds of separate assets he owned prior to the parties' marriage to be applied toward the purchase price for The Rustic Motel, a business venture and related real estate located in St. Albans, Kanawha County, West Virginia,

which was subsequently titled in his name alone. A copy of this deed is attached hereto as "Appellant Exhibit C" and is incorporated herein by reference. The total purchase price for this property and business was One Hundred Seventy Thousand Dollars ($170,000.00); and the remaining balance of the purchase price ($82,000.00) was subsequently satisfied from proceeds of the business during the term of the parties' marriage.

Prior to the parties' marriage, the Appellant, Gary Wolfingbarger, had received a lump sum settlement in the amount of Forty Three Thousand Dollars ($43,000.00) for a workers' compensation injury he sustained while working in the State of Ohio. *See* Gary Wolfingbarger deposition transcript at pages 9-10. Prior to the parties' marriage, the Appellant had sold a business enterprise he owned in the State of Ohio for an additional Twenty Two Thousand Dollars ($22,000.00). *See* Id. at pages 10-11. The Appellant had also sold a house in the State of Ohio which he had owned as separate property prior to the parties' marriage for the sum of Twenty Three Thousand Dollars ($23,000.00). *See* Id. at page 11. In all, the Appellant applied a total of Eighty Eight Thousand Dollars ($88,000.00) in separate, pre-marital assets to his purchase of the real estate and business venture known as The Rustic Motel, which he purchased from his sister, Lyda E. Rose and her husband, Edgar A. Rose on or about March 12, 1979.

During the next 18 years, the parties resided at the Rustic Motel, which Mr. Wolfingbarger operated as a sole proprietorship. In the late summer or early fall of 1997, the parties had a discussion regarding what Mr. Wolfingbarger intended to do with the Rustic Motel if the parties' financial condition improved to the point where they could contemplate retirement. The Appellee had spent a prolonged period of time attempting to persuade Mr. Wolfingbarger to convey the business to her biological son from a previous marriage, Randy Carter. Based on Mr. Carter's

ineptitude (which will be described in greater detail hereinbelow), Mr. Wolfingbarger informed the Appellee that he was unwilling to convey the motel to Mr. Carter, and that in the event the parties were able to retire, he had decided to convey the motel to his own biological daughter from a previous marriage, believing her to be a more fit candidate to run the business.

Shortly after learning of Mr. Wolfingbarger's intentions in this regard, the Appellee and her children conspired with one another to deprive him of his livelihood and either force him to agree to convey the motel to Mr. Carter upon his retirement or to destroy the motel's financial viability. To this end, the Appellee filed a baseless domestic violence petition with the Kanawha County Magistrate Court on or about October 2, 1997, thereby evicting Mr. Wolfingbarger from the Rustic Motel. A copy of the Appellee's *Domestic Violence Petition* is attached hereto as "Appellant Exhibit D" and is incorporated herein by reference. In so doing, the Appellee gained sole and exclusive access to approximately Fifty Five Thousand Dollars ($55,000.00) in cash which the parties had stored in a safe in the motel, which she promptly removed when she was forced to turn the property back over to the Appellant approximately three (3) months later. *See* the Appellant's *Financial Statement* at page 6 regarding the amount of money which was removed from the safe, a copy of which is attached hereto as "Appellant Exhibit E" and is incorporated herein by reference.

Mr. Wolfingbarger was served with a divorce petition on or about October 2, 1997, which was filed shortly before the aforesaid *Domestic Violence Petition.* At that time, the Appellee was being represented by Charles W. Covert, Esq. the first of several attorneys who would represent her interests in connection with the multiple divorce actions which were filed by the parties between 1997 and 1999. The Appellant immediately filed a *Motion For Emergency Ex Parte Relief* with the Kanawha County Circuit Court, seeking to regain control of the motel and asking the Court to

protect his interests in approximately Eighty Six Thousand Dollars ($86,000.00) which he believed the Appellee had unilaterally removed from the parties' savings account. Mr. Wolfingbarger also asked the Court to protect his interests in three or four certificates of deposit, valued between Thirty Thousand Dollars ($30,000.00) and Forty Thousand Dollars ($40,000.00) which the Appellee had cashed in without his permission. A copy of the aforesaid *Motion For Emergency Ex Parte Relief* is attached hereto as "Appellant Exhibit F" and is incorporated herein by reference.

The Appellee's totally groundless *Domestic Violence Petition* was subsequently dismissed by the Kanawha County Magistrate Court, as reflected by a copy of the disposition sheet which is attached hereto as "Appellant Exhibit G" and is incorporated herein by reference.

Shortly after filing her original divorce action, the Appellee apparently terminated the services of Mr. Covert and retained a new attorney, Anne Shaffer, to represent her interests. On or about July 16, 1998, Ms. Shaffer filed a *Motion To Withdraw* as the Appellee's counsel, which motion was subsequently granted by the Court.

At some point during the next two (2) months, the Appellee retained the services of her third attorney, Susan Shepherd, who for some unknown reason initiated a completely new divorce action on September 15, 1998 while the original petition was still pending.

In the midst of all of these legal maneuvers, and apparently having had some time to reflect on both the moral turpitude of her actions and her rising attorney's fees, the Appellee approached the Appellant directly to ascertain his interest in resolving their dispute amicably. Mr. Wolfingbarger expressed his willingness to attempt to forge a voluntary agreement resolving the parties' outstanding financial issues, and the Appellee subsequently dismissed her third attorney, thereby accepting responsibility for conducting her own negotiations.

On February 12, 1999, the parties began to attempt to negotiate a resolution of their outstanding financial issues. The undersigned counsel explained to the Appellee that he was solely representing her husband, and that he did not represent her "in any manner whatsoever." The Appellee swore under oath that she understood the undersigned counsel's role, and she further swore under oath that she had "terminated Susan Shepard's services as (her) attorney in the two (2) divorce actions which (were) currently pending." The Appellee further swore under oath that she "wish(ed) to proceed as (her) own attorney in this matter while attempting to negotiate a property settlement agreement with my husband, until such time as I believe those negotiations are not proceeding appropriately and I reserve unto myself the right to retain my own counsel at any time during those negotiations." A copy of this sworn instrument is attached hereto as "Appellant Exhibit H" and is incorporated herein by reference.

A week later, on February 19, 1999, the parties finally resolved their outstanding financial disputes and executed a written *Property Settlement Agreement* which set forth the terms of their agreement, a copy of which is attached hereto as "Appellant Exhibit I" and is incorporated herein by reference. In their *Agreement*, both parties agreed to waive their rights to seek alimony from the other, and specifically released one another from payment of alimony "now and in the future." *See* Appellant Exhibit I at pages 1-2. In the *Agreement*, the Appellant agreed that "all cash, including certificates of deposit and any funds deposited in any joint checking or savings account which the (Appellee) and/or her children by a previous marriage confiscated from the parties' marital residence, from the business funds of the Rustic Motel, or from such joint accounts, shall be retained by the (Appellee) as payment towards her distribution of marital assets." Id. at 7. The Appellant further agreed that the Appellee would "retain as her equitable share of personal property, household goods

and furnishings, any and all such items which she took with her or acquired at or about the time of the parties' separation, or which she has obtained following the parties' separation, as her sole and separate property." Id. at 6-7.

Crucially, the Appellant agreed that he would pay the Appellee the sum of Two Thousand Dollars ($2,000.00) per month for the remainder of her life. Id. at 2-5. The parties utilized the figure of Two Hundred Forty Five Thousand Two Hundred Forty Seven Dollars ($245,247.66) as the basis for calculating the Appellee's net equitable distribution of the parties' marital assets, after taking into consideration the approximately One Hundred Eighty One Thousand Dollars ($181,000.00) in marital assets which the Appellee had confiscated at the time of the parties' separation, as well as the Appellee's agreement to waive alimony. Id. at 3. All told, the Appellee would be given an equitable distribution of approximately Four Hundred Twenty Six Thousand Two Hundred Forty Seven Dollars ($426,247.66) from total marital assets estimated at Six Hundred Twenty Four Thousand Nine Hundred Eighty Dollars ($624,980.00) and an additional Two Hundred Eighty Eight Thousand Nine Hundred Eighty Nine Dollars and Eighty Two Cents ($288,989.82) which the Appellant attributed as separate property related to the value of the Rustic Motel. In exchange, the Appellee agreed to convey all of her interest in the parties' remaining assets unto the Appellant, while the Appellant agreed to relinquish his interests in the parcel of real estate situate in Putnam County, West Virginia which the Appellee had purchased partially with the proceeds of the funds she had confiscated at the time of the parties' separation. Id. at 2.

Mr. Wolfingbarger testified at his deposition that he had cashed in approximately Forty Six Thousand Dollars ($46,000.00) from his life insurance policies and an additional Eighteen Thousand Dollars from his retirement plan during the pendency of the parties' divorce just to keep The Rustic

Motel above water and to continue honoring his obligations under the terms of the parties' *Property Settlement Agreement*. *See* Gary Wolfingbarger deposition transcript at pages 30-31, 48 and 50. Mr. Wolfingbarger further testified that "business has been bad" and that "it went in the red last year." *See* Id. at page 33. Mr. Wolfingbarger specifically testified that during the "two and a half to three months" that the Appellee and her son, Randy Carter, had evicted him from the property and prevented him from operating the motel in the Fall of 1997, "they run the business more or less into the ground." As of the date of his deposition on November 26, 2001, Mr. Wolfingbarger testified that the motel's business still had not financially recovered from the downturn in its reputation which had started four years earlier when the Appellee and her son had "kept it closed down the biggest part of the time" during that period of time. *See* Id. at page 35.

Mr. Wolfingbarger testified regarding the actions of the Appellee and her son during the time period when they prevented him from operating the motel, noting that they had "took most of (the hotel's) linens with them, and I had to go out and replace them." *See* Id. at page 37. Mr. Wolfingbarger also testified that the Appellee and her son had stolen "all of the furniture and everything" from the parties' residential unit and the Rustic's thirty (30) motel rooms. *See* Id. at page 37. Mr. Wolfingbarger also testified that the Appellee's son had stolen the one gun he owned at the time of the parties' separation. *See* Id. at page 55.

Mr. Wolfingbarger further testified that he brought his nephew, Kenneth Harrah, in to help him continue operating the Rustic Motel, largely because he couldn't afford to pay any staff members and he needed to continue generating income because "I've got to pay (the Appellee) every month." *See* Id. at page 36. The Appellant specifically testified that "I couldn't even afford no help at the time because (the Appellee and her son) took everything I had. The only thing they left me

was a bunch of bills." Id.

Regarding the allegations made by the Appellee's counsel that the Rustic Motel was a partnership between the parties, Mr. Wolfingbarger testified that his wife "would do maid work at times. And a lot of times she just sat around, you know, and do nothing." *See* Id. at page 40. Mr. Wolfingbarger testified that, "I, more or less, did all of the work there." Id. Mr. Wolfingbarger further testified that the Rustic Motel "was something I worked for all my life and, you know, put everything I ever owned in it." *See* Id. at page 42.

Mr. Wolfingbarger testified that "one of the reasons" for the parties' divorce was that the Appellee was upset that he wouldn't "let (her son) have (the motel)" if the parties were ever able to retire. *See* Id. at page 42. The Appellant testified that he was unwilling to trust Mr. Carter to run the motel based upon the problems he had experienced the one time he had listened to his wife and given her son a chance to prove his competence, which included being victimized by a robbery associated with "a big drug party" Mr. Carter had thrown at the motel.

It is undisputed that Mr. Wolfingbarger faithfully paid the Appellee the sum of Two Thousand Dollars ($2,000.00) each and every month from February 1999 until December 2004, as required under the terms of the parties' *Property Settlement Agreement*, for a total of One Hundred Forty Two Thousand Dollars ($142,000.00), relying on the Appellee's covenants to honor that *Agreement*. No witness, not even the Appellee herself, offered any testimony whatsoever which would indicate that the parties' *Property Settlement Agreement* was obtained by fraud, duress or other unconscionable conduct. Nor did any witness offer any testimony which would indicate that the parties did not express themselves in said *Property Settlement Agreement* in terms which, if incorporated into a judicial order, would be enforceable by a court in future proceedings. Likewise,

no witness offered any testimony which would indicate that the parties' *Property Settlement Agreement*, viewed in the context of the actual contributions of the respective parties to the net value of the marital property of the parties, was so inequitable as to defeat the purposes of this section, and such agreement was inequitable at the time the same was executed. Accordingly, pursuant to the terms of W.Va. Code §48-7-102, the Court was obligated to enforce the terms of the parties' written *Property Settlement Agreement* ("In cases where the parties to an action commenced under the provisions of this chapter have executed a separation agreement, then the court shall divide the marital property in accordance with the terms of the agreement. . .")

Unfortunately, in his *Final Order* which was entered on January 5, 2005, Judge Montgomery erroneously refused to enforce the terms of the parties' *Property Settlement Agreement*. Moreover, Judge Montgomery erroneously failed to provide Mr. Wolfingbarger with proper credit for all of the proceeds of his separate, pre-marital assets which he applied to the purchase price of the Rustic Motel in 1979, in accurate proportion to the asset's current fair market value. Furthermore, Judge Montgomery erroneously directed Mr. Wolfingbarger to pay Five Hundred Dollars ($500.00) per month in alimony to the Appellee despite the fact that he only earns approximately Five Hundred Dollars ($500.00) per month in Social Security benefits coupled with the fact that the Court correctly noted that the Rustic Motel since the year 2000 "no longer (had) current excess earnings" and "there is currently no apparent value to the business." Accordingly, the aforesaid *Final Order* in this case must be reversed.

ASSIGNMENTS OF ERROR

1. THE LOWER COURTS' REFUSAL TO ENFORCE THE TERMS OF THE PARTIES' WRITTEN *PROPERTY SETTLEMENT AGREEMENT* CONSTITUTED AN ABUSE OF DISCRETION

2. THE LOWER COURTS' RULINGS REGARDING EACH PARTY'S EQUITABLE DISTRIBUTION OF MARITAL ASSETS WERE CLEARLY WRONG OR AGAINST THE PREPONDERANCE OF THE EVIDENCE, BASED ON THE FACTORS ESTABLISHED IN W.VA. CODE §48-7-103

3. THE LOWER COURTS' FINDINGS OF FACT SUPPORTING AN AWARD OF ALIMONY TO THE APPELLEE WERE CLEARLY ERRONEOUS

4. THE LOWER COURTS' AWARD OF ALIMONY TO THE Appellee WAS AN ABUSE OF DISCRETION

ARGUMENT

I. THE LOWER COURTS' REFUSAL TO ENFORCE THE TERMS OF THE PARTIES' WRITTEN *PROPERTY SETTLEMENT AGREEMENT* CONSTITUTED AN ABUSE OF DISCRETION

A. The Parties' *Property Settlement Agreement* Constituted A Valid And Enforceable Settlement Agreement Pursuant To W.Va. Code §48-6-101 and §48-7-102

As noted above, the parties executed a written *Property Settlement Agreement* on February 19, 1999. In it, the parties note that they "intend to live separate and apart" and that they were "desirous of setting their respective property rights and other matters arising between them." *See* Appellant Exhibit I at page 1. Accordingly, the parties' *Property Settlement Agreement* meets the definition of a "property settlement or separation agreement" as that term is defined by W.Va. Code §48-6-101.

Pursuant to W.Va. Code §48-7-102, the lower courts were legally required to divide the parties' marital property in accordance with the terms of their *Property Settlement Agreement*. As this Honorable Court has held on several occasions, "'The primary object in construing a statute is to ascertain and give effect to the intent of the legislature." Syl. pt. 1, Smith v. State Workmen's Compensation Commissioner, 159 W. Va. 108, 219 S.E.2d 361 (1975). Syl. pt. 2, Anderson v. Wood, 204 W. Va. 558, 514 S.E.2d 408 (1999)." Syl. pt. 2, Expedited Transportation Systems, Inc.

v. Vieweg, 207 W.Va. 90, 529 S.E.2d 110 (2000).

The word "shall" is mandatory. *See* State v. Allen, 208 W. Va. 144, 153, 539 S.E.2d 87, 96 (1999) ("Generally, 'shall' commands a mandatory connotation and denotes that the described behavior is directory, rather than discretionary."; Syl. pt. 1, E.H. v. Matin, 201 W. Va. 463, 498 S.E.2d 35 (1997) ("'It is well established that the word "shall," in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.'" Syl. pt. 1, Nelson v. West Virginia Pub. Employees Ins. Bd., 171 W. Va. 445, 300 S.E.2d 86 (1982). *Accord* State v. Allen, *supra*; Keplinger v. Virginia Elec. and Power Co., 208 W.Va. 11, 537 S.E.2d 632 (2000).

W.Va. Code §48-7-102 reads as follows:

> "In cases where the parties to an action commenced under the provisions of this chapter have executed a separation agreement, then the court **shall divide the marital property in accordance with the terms of the agreement**, unless the court finds:
> (1) That the agreement was obtained by fraud, duress or other unconscionable conduct by one of the parties; or
> (2) That the parties, in the separation agreement, have not expressed themselves in terms which, if incorporated into a judicial order, would be enforceable by a court in future proceedings; or
> (3) That the agreement, viewed in the context of the actual contributions of the respective parties to the net value of the marital property of the parties, is so inequitable as to defeat the purposes of this section, and such agreement was inequitable at the time the same was executed" (emphasis added).

In this case, the court made absolutely no findings of fact which would indicate that any one of these exceptions should apply to obviate the enforcement of the parties' *Property Settlement Agreement*. The absence of such findings of fact is not surprising in light of the fact that the Appellee never appeared in court or at a scheduled deposition, where she could have offered testimony in support of such a false claim, but likewise would have been subjected to cross-

examination on those issues. Instead, the Appellee has attempted to utilize the arguments of her fifth attorney to escape the terms of her agreement, without introducing any evidence whatsoever which would indicate that any of these three statutory exceptions should be interposed in this case.

This Honorable Court has consistently held that a valid written agreement using plain and unambiguous language is to be enforced according to its plain intent and should not be construed. *See* Syl. pt. 3, Clint Hurt & Associates, Inc. v. Rare Earth Energy, Inc., 198 W.Va. 320, 480 S.E.2d 529 (1996)("'A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.'", *quoting* Syl. pt. 1, Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1962)). *See also* Dawson v. Norfolk and Western Ry. Co., 197 W.Va. 10, 475 S.E.2d 10 (1996), VanKirk v. Green Const. Co., 195 W.Va. 714, 466 S.E.2d 782 (1995), Watts v. West Virginia Dept. of Health and Human Resources/Division of Human Services, 195 W.Va. 430, 465 S.E.2d 887 (1995), HN Corp. v. Cyprus Kanawha Corp., 195 W.Va. 289, 465 S.E.2d 391 (1995), Raines v. White, 195 W.Va. 266, 465 S.E.2d 266 (1995), Akers v. West Virginia Dept. of Tax and Revenue, 194 W.Va. 456, 460 S.E.2d 702 (1995), Scyoc v. Holmes, 192 W.Va. 87, 450 S.E.2d 784 (1994), Fraley v. Family Dollar Stores of Marlinton, West Virginia, Inc., 188 W.Va. 35, 422 S.E.2d 512 (1992), Billiter v. Melton Truck Lines, Inc., 187 W.Va. 526, and 420 S.E.2d 286 (1992), Sally-Mike Properties v. Yokum, 175 W.Va. 296, 332 S.E.2d 597 (1985).

Because there was no evidence introduced in the Family Court proceedings which would indicate that any of the three statutory exceptions cited hereinbove justified obviating the terms of the parties' *Property Settlement Agreement*, Judge Montgomery abused his discretion in refusing to enforce its terms in dividing the parties' marital assets. Specifically, the Appellant asserts that Judge

Montgomery was clearly wrong in finding that "Pricie Wolfingbarger has since refuted the *Property Settlement Agreement*," and in apparently relying on the fact that Pricie did not subsequently execute any deeds conveying the parties' real estate to the Appellant as justification for concluding that she had any legal or equitable basis for effectuating a "rescission" of the parties' contract.

B. The Appellee's Actions In Refusing To Honor The Terms Of The Parties' *Property Settlement Agreement* Following Her Execution Of The Contract Do Not Constitute An Effective "Rescission" Of Their Contract.

In the case of Bossie v. Boone Co. Bd. Of Education, 211 W.Va 694, 568 S.E.2d 1 (2002), this Honorable Court examined the law regarding the concept of "rescission" in great detail. In that case, the Court noted that "To 'rescind' is '[t]o abrogate or cancel (a contract) unilaterally or by agreement' or '[t]o make void; to repeal or annul[.]'" Id. at 568 S.E.2d 4, *quoting* Black's Law Dictionary 1308 (7th ed. 1999). This Court went on to note that, "More specifically, it has been said that: 'To rescind a contract is not merely to terminate it but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract, and to restore the parties to the relative positions which they would have occupied if no such contract had ever been made.'"Id. at 4-5, *quoting* Sylvania Industrial Corporation v. Lilienfeld's Estate, 132 F.2d 887, 892 (1943) (*quoting* Black, Rescission and Cancellation, 2d ed., vol. 1, § 1).

Citing another source, the Court noted that, "'Generally speaking, the effect of a rescission is to extinguish the contract and to annihilate it so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken. The effect of a rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract.'" Id. at 5, *quoting*17A Am. Jur. 2d *Contracts* § 600 (1991). It is clear that Pricie

Wolfingbarger's actions in refusing to execute any deeds to the Appellant, as she was contractually obligated to do under the terms of the parties' *Property Settlement Agreement*, do not constitute an effective rescission of the parties' contract.

First of all, it should be noted that the *Property Settlement Agreement* did not include any provision whereby either party to rescind the contract. In Waddy v. Riggleman, ____ W.Va. _____, 606 S.E.2d 222 (2004), this Court reviewed a case where one party to a series of contracts had attempted to excuse its performance on the basis of impossibility and other defenses. This Honorable Court reversed the circuit court's decision which had been unfavorable to the party which was seeking specific performance of the contracts in question. In so holding, this Court observed that "(these) contracts. . . included no provision regarding the circumstances under which the contract could be rescinded by either party. In essence, the circuit court's conclusion. . .grants to the Rigglemans a unilateral right to rescind the contract that was not bargained for by either party. This the circuit court is not entitled to do." Id. at 236, footnote 13, *citing* Syl. pt. 1, Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W. Va. 97, 468 S.E.2d 712 (1996) ("'It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them.'" (internal citations omitted)).

It has been held in Virginia that any party seeking to rescind a contract must provide clear and unambiguous notice of their intent to do so. *See* State Farm Mut. Auto. Ins. Co. v. Pederson, 185 Va. 941, 41 S.E.2d 64 (1947). Likewise, this Court has held that any party seeking to rescind a contract "must show the adoption and diligent pursuit o fall reasonably practicable means to eliminate all doubt and uncertainty as to the existence of grounds for rescission of a written

contract." 16 Michie's Juris., Rescission, Cancellation And Reformation §7 (1987), *citing* Laing v. Price, 75 W.Va. 192, 83 S.E.2d 497 (1914). If an attempted rescission is not made "within a reasonable time, the right to rescind is lost." Id., *citing* Shreve v. Casto Trailer Sales, Inc., 150 W.Va.669, 149 S.E.2d 238 (1966).

This Court has held on several occasions that even if a party might have been equitably entitled to seek rescission of a contract on some basis, if he "treats the contract as a subsisting obligation and leads the other party to believe that the contract is still in effect, he will have waived his right to rescind." Id., Rescission, Cancellation And Reformation §8, *citing* Gaston v. Wolfe, 132 W.Va. 791, 53 S.E.2d 632 (1949); *See also* Shreve, *supra.* There can be no doubt that, by accepting a total of One Hundred Forty Two Thousand Dollars ($142,000.00) in payments from Mr. Wolfingbarger for 71 consecutive months in accordance with the terms of their *Property Settlement Agreement*, Mrs. Wolfingbarger led him to believe that their contract was still in effect. Accordingly, Judge Montgomery's *Final Order*, which essentially permitted the Appellee to rescind the parties' *Property Settlement Agreement*, must be reversed.

Moreover, any attempt by the Appellee to rescind the *Property Settlement Agreement* in this case must be barred pursuant to the equitable doctrines of laches and "unclean hands." *See* Calacino v. McCutcheon, 177 W.Va. 684, 356 S.E.2d 23 (1987); Wood v. Snodgrass, 116 W.Va. 538, 182 S.E.2d 286 (1935). By refusing to execute the deeds of conveyance which were called for under the terms of the parties' *Property Settlement Agreement*, the Appellee herself breached the terms of that contract, the Appellee's "unclean hands" will bar her from rescinding it. Likewise, by forcing the Appellant to continue paying her the sum of Two Thousand Dollars ($2,000.00) per month while he was struggling to restore the Rustic Motel to the profitable financial state it had enjoyed before she

and her son had ruined its reputation and absconded with many of its assets — for almost six years — will bar any such rescission of that *Agreement*.

C. Even If The Appellee's Actions Constitute An Effective "Rescission" Of The Parties' *Property Settlement Agreement*, The Appellant Is Entitled To Credit For The $142,000.00 In Monthly Payments He Tendered To The Appellee Between February 1999 And December 2004.

Although the Appellant believes that Judge Montgomery committed reversible error in refusing to enforce the terms of the parties' *Property Settlement Agreement*, it cannot be disputed that Mr. Wolfingbarger is legally entitled to be given credit for the $142,000.00 in monthly payments which he tendered to the Appellee between February 1999 and December 2004 in reliance upon the terms of that contract.

It has been repeatedly noted that courts should be reluctant to permit a party to rescind a contract unless the could can "put the parties in *status quo*, by requiring each to restore to the other what he obtained by virtue of the contract." 16 Michie's Juris., Rescission, Cancellation And Reformation §16, *citing, inter alia,* Bruner v. Miller, 59 W.Va. 36, 52 S.E. 995 (1906); Wortington v. Collins, 39 W.Va. 406, 19 S.E. 527 (1894); Ellison, Son & Co. v. Flat Top Grocery Co., 69 W.Va. 380, 71 S.E. 311 (1911). Accordingly, if Judge Montgomery's refusal to enforce the terms of the parties' *Property Settlement Agreement* — which effectively permitted the Appellee to rescind that contract — is not deemed to constitute a reversible abuse of discretion, at the very least, the Appellant must be placed back in the position he occupied prior to the parties' execution of their contract by being given credit for the $142,000.00 which he paid to the Appellee between February 1999 and December 2004. Moreover, in any equitable distribution of the parties' assets which would be performed outside the parameters of the parties' *Property Settlement Agreement*, the Appellant

must be given credit for a proportionate share of the taxes and insurance which he has expended between on the parties' assets since February 1999, in the mistaken belief that he was paying taxes on assets which he was to receive under the terms of the parties' *Agreement*.

As this Honorable Court has held, "It is generally recognized in the law of restitution that if one party pays money to another party (the payee) because of a mistake of fact that a contract or other obligation required such payment, the party making the payment is entitled to repayment of the money from the payee." Syl. pt. 4, Prudential Insurance Company of America v. Couch, 180 W.Va. 210, 376 S.E.2d 104 (1988). In Wolfe v. Sutphin, 201 W.Va. 35, 491 S.E.2d 35 (1997), this Court further analyzed this concept by noting that "the critical consideration is not the existence of a contract, but rather that there is a mistake of fact that a contract or other obligation does exist. The central predicate is the mistake about the existence of a contract, and not the actual existence of a contract." Id. at 491 S.E.2d 39.

II. THE LOWER COURTS' RULINGS REGARDING EACH PARTY'S EQUITABLE DISTRIBUTION OF MARITAL ASSETS WERE CLEARLY WRONG OR AGAINST THE PREPONDERANCE OF THE EVIDENCE, BASED ON THE FACTORS ESTABLISHED IN W.VA. CODE §48-7-103

It cannot be overemphasized that the only person who offered sworn testimony in connection with this divorce proceeding was the Appellant. As noted above, the Appellant testified that approximately Eighty Eight Thousand Dollars ($88,000.00) of the total purchase price for the Rustic Motel had come in the form of proceeds from disposition of his personal, separate assets. *See* Gary Wolfingbarger deposition transcript at pages 9-11. This figure represents approximately 51.76% of the property's original purchase price, and constitutes "separate property" within the meaning of W.Va. Code §48-1-237 ("Property acquired by a person during marriage in exchange for separate

property which was acquired before the marriage"). The remaining 49.24% of the property's purchase price was paid from income generated during the parties' marriage, and constitutes marital property subject to equitable distribution pursuant to the provisions of W.Va. Code §48-7-103.

It is clear that the valuation which Judge Montgomery applied to the Rustic Motel ($309,000.00) was based upon the Kanawha County Assessor's records. *Final Order* at 2-3. As Judge Montgomery correctly observed, the business which was conducted upon this real estate "no longer has current excess earnings" and "there is currently no apparent value to the business." Id. at 5. Accordingly, the increase in the value of the Rustic Motel must be evaluated within the context of both W.Va. Code §48-1-237(6) and the framework for "passive appreciation" which this Honorable Court has previously delineated in cases such as Shank v. Shank, 182 W. Va. 271, 387 S.E.2d 325 (1989) and Mayhew v. Mayhew, 205 W.Va. 490, 519 S.E.2d 188 (1999).

It is important to note that the March 12, 1979 deed for the Rustic Motel conveyed the property solely to Gary Wolfingbarger, while the June 6, 1989 deed for an adjoining parcel (which Judge Montgomery properly termed marital property) conveyed that property to both parties, as joint tenants with rights of survivorship. This differential treatment of these two conveyances demonstrates that Mr. Wolfingbarger was well aware of the separate nature of his personal contributions to the purchase price for the Rustic Motel, and that he was determined that portion of the purchase price which flowed from his disposition of personal assets would remain his separate property.

Unfortunately, Judge Montgomery misapplied W.Va. Code §48-7-103 in electing to give the Appellant credit for only Sixty Eight Thousand Dollars ($68,000.00) of the current value of the Rustic Motel. Firstly, Judge Montgomery mistakenly concluded that the Appellant "testified he

could not recall exactly how much of (the proceeds from his bar, his house and a mobile home) that was used on the down payment." *Final Order* at 2. To the contrary, Mr. Wolfingbarger specifically testified that he paid all of the $43,000 settlement he received for a workers' compensation injury to the purchase price of the Rustic Motel. Gary Wolfingbarger deposition transcript at 10-11. Moreoever, Mr. Wolfingbarger testified that all of the $23,000 proceeds he received from the sale of a house were applied to the purchase price of the Rustic Motel. Id. at 11 ("Q: And was that money also used to purchase or to help fund the purchase of the Rustic? A: Yes. And I sold a mobile home, too.") While he did testify that he used the $22,000 which he received from the sale of the Miami Tavern "partly, mostly" to make a downpayment on the Rustic Motel, he was not asked how much money he received from the mobile home. Thus, Judge Montgomery only gave Mr. Wolfingbarger credit for $2,000 of the $22,000 from the proceeds of the sale of the Miami Tavern, despite the fact that he clearly testified that those proceeds were "mostly" used for that purpose.

More problematically, Judge Montgomery failed to give Mr. Wolfingbarger any credit whatsoever for the increase in the value of the Rustic Motel which was attributable to that portion of the purchase price (51.76%) which flowed from the Appellant's application of the proceeds from the disposition of his various items of separate property. Pursuant to W.Va. Code §48-7-103, Judge Montgomery failed to properly account for "the extent to which (the Appellant) has contributed to the acquisition, preservation and maintenance, or increase in value of marital property by monetary contributions, including. . .Funds which are separate property."

Judge Montgomery also failed to properly account for the extent to which Mr. Wolfingbarger made contributions in the form of "labor performed in the actual maintenance or improvement of tangible marital property" and "labor performed in the management or investment of assets which

are marital property." Again, the Appellant's testimony regarding the minimal contributions which Mrs. Wolfingbarger made towards the operation of the Rustic Motel was uncontroverted. Not a single witness offered any sworn testimony to dispute his contentions that "(he), more or less, did all of the work there" and that while the Appellee "would do maid work at times," there were also "a lot of times, she just sat around, you know, and (did) nothing." Despite the fact that no witness offered testimony which would support the conclusion that the Appellee made equal contributions to the acquisition, preservation and maintenance, or increase in value of the parties' marital property, Judge Montgomery proceeded to award the Appellee an equal distribution of that property. Clearly, this result — unsupported by the evidence — should not be deemed to constitute an "equitable distribution" of the parties' marital assets.

Finally, it is clear that Judge Montgomery did not properly consider the negative impact which resulted from the actions committed by the Appellee and her son, Randy Carter, during the fall of 1997 when they prevented the Appellant from operating the Rustic Motel and essentially "run the business more or less into the ground," from which catastrophe "it still hasn't came back yet." Gary Wolfingbarger deposition transcript at 34-35. While Judge Montgomery properly noted that the Appellant's business venture was experiencing grave financial difficulties, he failed to properly reduce the Appellee's equitable distribution in order to take into account the extent to which her actions "dissipate(d) or depreciate(d) the value of the marital property of the parties." W.Va. Code §48-7-103(4). Again, Mr. Wolfingbarger's testimony regarding the causal relationship between the Appellee's actions and the Rustic Motel's subsequent financial difficulties was undisputed.

It is the Appellant's contention that, should the parties' *Property Settlement Agreement* not be enforced, a proper equitable distribution of the parties' separate and marital assets would protect

his contribution of separate assets towards 51.76% of the purchase price of the Rustic Motel by recognizing that 51.76% of the Rustic Motel's current value constitutes his separate property. Moreover, of the remaining 49.24% value of the Rustic Motel which constitutes marital property, the Appellant contends that his equitable distribution should be no less than one-half of that portion, thereby rendering his total equitable distribution of the Rustic Motel at 76.38% of its current value of $309,700.00, or no less than $236,548.86. Mrs. Wolfingbarger's equitable distribution of this asset would constitute no more than 24.62% of its current value, or no more than $73,151.14.

Likewise, should the parties' *Property Settlement Agreement* not be enforced, the Appellant contends that his equitable distribution of the real estate commonly known as "Bannum Place" would be no less than 50% of that asset's current value of $138,700.00, or no less than $69,350.00. By the same token, the Appellant contends that the Appellee's equitable distribution of this asset should be no more than 50% of its current value, or no more than $69,350.00.

If this Honorable Court determined that W.Va. Code §48-7-102 does not mandate that the parties' *Property Settlement Agreement* be enforced, the Appellant contends that his equitable distribution of the parties' remaining assets (a Florida condominium valued at $37,500; certificates of deposit valued at $40,000; checking and savings accounts valued at $86,000; cash in the parties' safe valued at $56,000; a pontoon boat valued at $6,500; an IRA previously liquidated to satisfy the Appellant's monthly payments to the Appellee valued at $18,000; and life insurance proceeds previously liquidated to satisfy the Appellant's monthly payments to the Appellee valued at $46,000) would be no less than 50% of those assets' total valuation of $290,000.00, or no less than $145,000.00. By the same token, the Appellant contends that the Appellee's equitable distribution of those assets should be no more than 50% of their total current value, or no more than $145,000.00.

Accordingly, the Appellant contends that a proper valuation of the Appellee's equitable distribution of their separate and marital assets would be no more than $287,501.14. The Appellant further contends that the Appellee's net equitable distribution initially should be reduced to take into consideration the funds she absconded in the fall of 1997 ($182,000.00), yielding a figure of $105,501.14. Finally, after the Appellee is given credit for the $142,000.00 in monthly payments which he tendered to her between February 1999 and December 2004 in accordance with the terms of the parties' *Property Settlement Agreement*, it is clear that the Appellee has been more than fairly compensated for her equitable distribution of the parties' property, and that Judge Montgomery's *Final Order* directing the Appellant to tender payment of an additional $129,800.00 above and beyond the payments he has tendered to date constitutes reversible error.

III. THE LOWER COURTS' FINDINGS OF FACT SUPPORTING AN AWARD OF ALIMONY TO THE APPELLEE WERE CLEARLY ERRONEOUS

As mentioned throughout this *Memorandum*, the parties voluntarily executed a *Property Settlement Agreement* whereby each party agreed to "waive any claim they have to alimony from the other, and each of them specifically releases the other from payment of alimony, now and in the future." *Property Settlement Agreement* at 1-2. The Appellant specifically relied on the Appellee's agreement to waive her claims to recover alimony in agreeing to the remainder of the terms of their *Property Settlement Agreement*, and in tendering a total of $142,000 in monthly payments to the Appellee during a period of almost six years while this matter remained in litigation. For that reason alone, Judge Montgomery's decision regarding the Appellee's entitlement to receive payment of Five Hundred Dollars ($500.00) per month in alimony from the Appellant for the remainder of her life constitutes reversible error, because the factors delineated in W.Va. Code §48-6-301 are only to be

considered:

> "In cases where the parties to an action commenced under the provisions of this article have not executed a separation agreement, or have executed an agreement which is incomplete or insufficient to resolve the outstanding issues between the parties, or where the court finds the separation agreement of the parties not to be fair and reasonable or clear and unambiguous. . ."

Nevertheless, it is important to examine Judge Montgomery's *Final Order* in greater detail in order to demonstrate that the findings of fact he relied upon in granting the Appellee alimony were clearly erroneous. The Appellant contends that the findings of fact recited in that *Final Order* yield little insight into what factors set forth in W.Va. Code §48-6-301, if any, Judge Montgomery believed were present in this case and warranted an award of alimony to the Appellee.

For instance, the *Final Order* contained no findings of fact regarding the respective education levels of the parties, their respective employment histories, or the other factors set forth in W.Va. Code §48-6-301(b)(3) which are to serve as the basis for evaluating the parties' income-earning abilities. The *Final Order* further contained no findings of fact regarding the manner in which the Appellant's sizeable monthly payments to the Appellee under the terms of their *Property Settlement Agreement* — which forced him to liquidate approximately Sixty Thousand Dollars ($60,000.00) of marital assets during the pendency of this divorce — negatively affected the Appellant's ability to pay alimony to the Appellee.

Moreover, although Judge Montgomery specifically found that the Rustic Motel "no longer has current excess earnings," the conclusion seems inescapable that he must have, at least subconsciously, factored in some level of income purportedly derived from that property in concluding that the Appellant could afford to pay $500.00 per month in alimony to the Appellee. After all, aside from any such income being derived from the Rustic Motel, the only other source of

income available to the Appellant is approximately Five Hundred Dollars ($500.00) per month in social security benefits, as Judge Montgomery specifically found. *Final Order* at Finding of Fact 9G. Additionally, as the evidence demonstrates that the Appellee was 73 years old at the time the *Final Order* was entered, it seems Judge Montgomery's failure to include a finding of fact pertaining to the Appellee's receipt of social security benefits (believed to be roughly equivalent to that received by the Appellant) is clearly erroneous.

IV. THE LOWER COURTS' AWARD OF ALIMONY TO THE APPELLEE WAS AN ABUSE OF DISCRETION

As noted hereinabove, the only finding of fact contained in the *Final Order* in this case pertaining to either of the parties' respective incomes is Finding of Fact 9E, which found that "Gary Wolfingbarger has Social Security income of approximately $500.00 per month." However, because Judge Montgomery has ordered the Appellant essentially to surrender all of this monthly income to the Appellee by directing him to pay her $500.00 per month in alimony, he must have subconsciously attributed some level of income flowing from the Rustic Motel to the Appellant, although he specifically found that "this business no longer has current excess earnings."

If so, such subconscious attribution of income in this instance was violative of W.Va. Code §48-6-301(b)(5), which indicates that "for the purposes of determining a spouse's ability to pay spousal support, the court may not consider the income generated by property allocated to the payor spouse in connection with the division of marital property unless the court makes specific findings that a failure to consider income from the allocated property would result in substantial inequity" (emphasis added). Because Judge Montgomery apparently considered such income generated by real estate allocated to the Appellant in determining that he possessed sufficient financial ability to pay

the Appellee alimony, that ruling must be reversed. This conclusion is supported even more strongly by the fact that the *Final Order* did not contain any specific findings of fact indicating that "substantial inequity" would result if the Court did not consider such income from the Rustic Motel; however, because Judge Montgomery specifically found that the Rustic Motel "no longer has current excess earnings," it is probable that any such specific finding of fact would have been clearly erroneous, as well.

It is well-established law in West Virginia that the essential basis of alimony is ability of the payor spouse to pay. Watson v. Watson, 113 W.Va. 267, 168 S.E. 373 (1933). Mr. Wolfingbarger earns approximately $500.00 per month in social security benefits. The *Final Order* directed him to pay all of that money to the Appellee in the form of monthly alimony. It is preposterous to suggest that Mr. Wolfingbarger possesses sufficient financial ability to pay any level of alimony to the Appellee under existing circumstances, let alone to suggest that he possesses sufficient financial ability to pay the sum directed by the lower court. Accordingly, it constituted reversible abuse of discretion for Judge Montgomery to include such an award of alimony in the *Final Order* in the case at bar.

Finally, it must be reiterated that Pricie Wolfingbarger's willful actions in the fall of 1997 devastated the reputation and financial condition of the Rustic Motel, as indicated by the Appellant's testimony and the documentation submitted to the court, including his tax returns for the years following the parties' separation. No person offered any testimony whatsoever which would indicate that his testimony in this regard is untrue or inaccurate! In light of this uncontroverted fact, it is unfathomable that the lower court would not have considered such actions to fall within the purview of W.Va. Code §48-6-301(b)(20): "Such other factors as the court deems necessary or appropriate

to consider in order to arrive at a **fair and equitable** grant of spousal support" (emphasis added).

CONCLUSION AND RELIEF SOUGHT

For the reasons stated hereinabove, the Appellant asserts that the lower courts' refusal to enforce the terms of the parties' *Property Settlement Agreement* constituted reversible abuse of discretion in violation of W.Va. Code §48-7-102 and applicable case law. Moreover, the Appellant asserts that the lower courts' refusal to enforce the terms of the parties' *Property Settlement Agreement* constituted reversible abuse of discretion because the Appellee failed to introduce sufficient evidence to demonstrate that she was legally or equitably entitled to unilaterally rescind that valid and binding contract. By the same token, in refusing to enforce the terms of the parties' *Property Settlement Agreement*, the Appellant asserts that the lower courts impermissibly abused their discretion by failing to return the parties to the positions they occupied prior to their execution of that contract and crediting him for the $142,000 in monthly payments which he faithfully tendered to the Appellee during the pendency of this divorce, as required by applicable law.

Furthermore, the Appellant asserts that the lower courts' rulings regarding each party's equitable distribution of marital assets were clearly wrong or against the preponderance of the evidence, based on the factors established in W.Va. Code §48-7-103. In this regard, the Appellant argues that the *Final Order* 1) failed to properly account for the application of the Appellant's premarital separate property proceeds to the purchase price for the Rustic Motel; 2) failed to properly account for contributions in the form of "labor performed in the actual maintenance or improvement of tangible marital property" and "labor performed in the management or investment of assets which are marital property;" and 3) failed to properly consider the negative impact which resulted from the

actions committed by the Appellee and her son, Randy Carter, during the fall of 1997 when they prevented the Appellant from operating the Rustic Motel and essentially "run the business more or less into the ground."

Additionally, the Appellant argues that the lower courts' findings of fact supporting an award of alimony to the Appellee were clearly erroneous, as demonstrated hereinabove. Finally, Mr. Wolfingbarger asserts that the lower courts' directive that he pay the sum of $500.00 per month to the Appellee in alimony was an abuse of discretion, in violation of this State's overarching policy that the essential basis of alimony is the ability of the payor spouse to pay. Watson v. Watson, 113 W.Va. 267, 168 S.E. 373 (1933).

Accordingly, the Appellant respectfully asks that this Honorable Court REVERSE the lower courts' rulings, thereby REVERSING the *Final Order* entered by Judge Montgomery in this matter. The Appellant further respectfully asks that this Honorable Court enter an Order directing the lower courts to enforce the terms of the parties' *Property Settlement Agreement*, or, in the alternative, to direct the lower courts to enter an Order which properly adjusts the parties' respective equitable distribution of assets in accordance with the principles argued hereinabove and which relieves the Appellant from any obligation to tender payments of alimony to the Appellee. The Appellant further respectfully requests that this Honorable Court grant him such other additional relief as it may deem mete and just in the circumstances.

GARY WOLFINGBARGER,

Appellant,

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CERTIFICATE OF SERVICE

I, Brent Wolfingbarger, counsel of record for the Appellant, Gary Wolfingbarger, do hereby certify that I have served a copy of the enclosed *Docketing Statement* and *Designation Of Record* upon the following opposing party by depositing a true and exact copy of the same into the United States Mail with sufficient prepaid postage attached this the 6th day of December, 2005, at the following address:

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